(14,936.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 348.

EUGENE BEEBE, SIMS PHILLIPS, AND ADELINE THOMAS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

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1 November Term, 1890.

At a circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, begun and held at Montgomery, Alabama, on the first Monday in November, it being the third day of said month, in the year of our Lord one thousand eight hundred and ninety—present and presiding, the Honorable Don A. Pardee, United States circuit judge, fifth circuit—Tuesday, December 9, 1890, a day of said term, the following proceedings were had:

2 *Summons and Complaint.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES OF AMERICA
vs.
JOSIAH MORRIS and Others. } # 59.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon Josiah Morris, Sims Phillips and Adeline Thomas, who are citizens of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Montgomery, on the first Monday of May next, to answer the complaint of the United States of America; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 27th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Attest: J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1886.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS, Defendants.

The plaintiff sues to recover the following tract of land, the tract of land known as the Montgomery race track, near Montgomery, Ala., containing (80) eighty acres, more or less, of which plaintiff, The United States of America, was possessed before the commencement of this suit, and after such possession accrued the defendant

entered thereupon and unlawfully withholds and detains the
3 same, together with one thousand dollars for the detention thereof.

WM. H. DENSON,
U. S. Att'y, for Pl'ff.

Received in office this 1st day of March, 1886.

W. W. ALLEN,
U. S. Marshal.

Executed by serving copy of the within summons and complaint on Josiah Morris Mar. 3, '86; on Sims Phillips Mar. 11, '86; on Adeline Thomas Mar. 11, '86.

W. W. ALLEN, *U. S. Marshal,*
By R. H. SOMMERVILLE, *Deputy.*

Returned and filed this 11th day of March, 1886.

J. W. DIMMICK, *Clerk.*

4 *Summons and Complaint.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE. } No. 57.

The President of the United States of America to the marshal of said district, Greeting:

You are hereby commanded to summon Eugene Beebe, who is a citizen of the State of Alabama, to appear before the hon. circuit court aforesaid, at the place of holding said court, at Montgomery, on the first Monday of May next, to answer the complaint of the United States of America; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 27th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Attest: J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Alabama.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
EUGENE BEEBE.

The plaintiff sues to recover the following tracts of land: Lot and building number (28) twenty-eight Market street, known as

5 the Rialto; also the tract of land known as the Montgomery race track, containing eighty acres, more or less, all within the county of Montgomery and State of Alabama, of which plaintiff, The United States of America, was possessed before the commencement of this suit, and after such possession accrued the defendant entered thereupon and unlawfully withholds and detains the same, together with one thousand dollars for the detention thereof.

WILLIAM H. DENSON,
United States Attorney.

Received in office this 1st day of March, 1886.

WM. W. ALLEN,
U. S. Marshal.

Executed by serving copy of the within summons and complaint on Eugene Beebe this the 3 day of March, 1886.

WM. W. ALLEN, *U. S. Marshal,*
By R. H. SOMMERVILLE, *Deputy.*

Returned and filed this 11th day of March, 1886.

J. W. DIMMICK, *Clerk.*

MONDAY, *December 9th,* 1889.

Order Granting Leave to Amend Complaint.

THE UNITED STATES
vs.
EUGENE BEEBE. } No. 57.

In this cause leave is granted complainant to amend complaint, which is done.

6 *Amendment to Complaint.*

Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES OF AMERICA
vs.
EUGENE BEEBE. } No. 57.

The plaintiff, by leave of court first had and obtained, amends the complaint herein by inserting, after the words "sues to recover" and before the words "the following tracts of land," the following words, to wit, "one undivided one-fourth interest in;" and by striking out the following words in said complaint, to wit, "lot and building No. (28) twenty-eight Market street, known as the Rialto; also:" and by adding after the words "eighty acres, more or less," the following words, to wit, "being all that certain tract of land

commencing at a point 3,960 feet, more or less, north of the east and west line, between sections one and twelve, township sixteen north, range seventeen east, and 605.3 feet, more or less, west of a point in the centre of the Western railway track where it is crossed by the public road, which is a continuation of Court street, Montgomery, on the road or street leading from the Western railway track into the Fair or 'Exposition' grounds, on the land of the Montgomery Land and Improvement Company, and running along and on said road or street west 1,980 feet; thence 17° 4′ to the right 963 feet; thence 5° 23′ to the left 1,340 feet, to a point near the east and west line between the north and south halves of the southeast quarter of section thirty-six, township seventeen north, range seventeen east; thence at a right angle east 1,330 feet, more or less; thence south 1,318 feet; thence east along the line between said section thirty-six and said section one 950 feet; thence in a southerly direction 1,330 feet, more or less, to the place of beginning, being the same premises heretofore commonly known as the 'Montgomery race track,'
7 and which was enclosed by a fence, said lands lying and being situated in the northeast quarter of section one, township sixteen north, range seventeen east, and in the southeast quarter of section thirty-six, township seventeen north, range seventeen east, all in the county of Montgomery and State of Alabama," and by inserting the word "twenty" before the words "one thousand dollars."

L. E. PARSONS, JR.,
United States Attorney,
GEO. F. MOORE,
Assistant United States Attorney,
GEO. H. PATRICK,
Special Ass't U. S. Attorney,
For Plaintiff.

Filed by leave of court December 9th, 1889.

J. W. DIMMICK, *Clerk.*

8 *Plea of Defendant Morris.*

In the Circuit Court of the United States for the Middle District of Alabama.

UNITED STATES OF AMERICA
vs.
JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } #59.

Now comes the said Josiah Morris and for answer to the declaration in said cause filed and for a plea thereto saith:

1st. That he is not guilty of unlawfully withholding and detaining the land in said complaint mentioned.

2nd. And for further plea in this behalf, by leave of the court, he saith that he is not guilty, jointly along with Sims Phillips and

Adeline Thomas, his codefendants, of unlawfully withholding and detaining the premises in said declaration named.

GRAVES & BLAKEY,
Att'ys for Josiah Morris.

Filed Dec. 6th, 1889.

J. W. DIMMICK, *Clerk.*

Order Granting Leave to Amend Complaint.

MONDAY, *December 9th*, 1889.

THE UNITED STATES
vs.
JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

In this cause leave is granted to complainant to amend complaint, which is done.

9 *Amendment to Complaint.*

Circuit Court of the United —, Middle District of Alabama.

THE UNITED STATES OF AMERICA
vs.
JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

The plaintiff, by leave of court first had and obtained, amends the complaint herein by inserting, after the words "sues to recover" and before the words "the following tract of land," the following words, to wit, "one undivided one-fourth interest in," and by adding after the words "eighty acres, more or less," the following words, to wit, "being all that certain tract of land commencing at a point 3,960 feet, more or less, north of the east and west line, between sections one and twelve, township sixteen north, range seventeen east, and 605.3 feet, more — less, west of a point in the centre of the Western railway tract where it is crossed by the public road, which is a continuation of Court street, Montgomery, on the road or street leading from the Western railway track into the Fair or 'Exposition' grounds, on the land of the Montgomery Land and Improvement Company, and running along and on said road or street west 1,980 feet; thence 17° 4′ to the right 963 feet; thence 5° 23′ to the left 1,340 feet to a point near the east and west line between the north and south halves of the southeast quarter of section thirty-six, township seventeen north, range seventeen east; thence at a right angle east 1,330 feet, more or less; thence south 1,318 (1,318) feet; thence east along the line between said section thirty-six and said section one 950 feet; thence in a southerly direction 1,330 feet, more or less, to the place of beginning, being the same premises heretofore commonly known as the 'Montgomery race track,' and which was enclosed by a fence, said lands lying and being situated in the

northeast quarter of section one, township sixteen north, range
10 seventeen east, and in the southeast quarter of section thirty-six, township seventeen north, range seventeen east, all in the county of Montgomery and State of Alabama," and by inserting the word "twenty" before the words "one thousand dollars."

L. E. PARSONS, JR.,
United States Attorney,
GEO. F. MOORE,
Assistant United States Attorney,
GEO. H. PATRICK,
Special Ass't U. S. Attorney,
For Plaintiff.

Filed by leave of court December 9th, 1889.

J. W. DIMMICK, *Clerk.*

10¼ In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
JOSIAH MORRIS, EUGENE BEEBE, SIMS PHILLIPS, ADALINE THOMAS. } In Ejectment. No. 59.

Plaintiff's Abstract of Title.

Possession & title of Eugene Beebe.

Eugene Beebe, by United States marshal, to the United States, under execution sale in the cases of The United States against Eugene Beebe *et al.*, in the circuit court of the United States for the middle district of Alabama.

L. E. PARSONS, JR.,
U. S. Attorney, for Plaintiff.

MONTGOMERY, ALA., *December* 16, 1889.

Received of plaintiff's attorneys the above abstract of title, furnished in compliance with our demand of December 13, 1889.

H. C. TOMPKINS,
Defendants' Attorney.

Rec'd from plaintiff's sp'l ass't U. S. att'y & filed April 2, 1891.

J. W. DIMMICK, *Clerk.*

10½ In the Circuit Court of the U. S. for the Middle Dist. of Alabama.

UNITED STATES
against
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADALINE THOMAS.

The plaintiff hereby notifies defendant that the United States demands an abstract of the title on which the defendants will rely for a defense in this cause.

Dec. 13, 1889.

L. E. PARSONS, *U. S. Att'y.*
GEO. F. MOORE,
Ass't U. S. Att'y.
GEO. H. PATRICK,
Sp'l Ass't U. S. Att'y.

Service accepted Dec. 13, 1889.

RICE & WILEY,
TOMPKINS & TROY,
Att'ys for Def'ts.

Abstract.

U. S. Circuit Court for the Middle District of Ala.

THE UNITED STATES
vs.
EUGENE BEEBE *et al.*

Defendant Beebe denies that the United States has any title to or interest in the property sued for, but he claimed title to an undivided interest in said property at the time the suit was commenced, under a deed executed by one Ferrie Henshaw to him, the said Beebe, dated February 23, 1878.

RICE & WILEY,
Att'ys for Def't.

Rec'd from plaintiff's sp'l ass't att'y & filed Ap'l 2, 1891.
J. W. DIMMICK, *Clerk.*

11 *Disclaimer of Josiah Morris.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES OF AMERICA
vs.
JOSIAH MORRIS *et. als.*
59.

Comes Josiah Morris, one of the defendants in the above-named cause, and for answer to the amended complaint in said cause filed December 9th, 1889, saith—

That he has and claims no interest or title in the said undivided

one-fourth interest now sued for in said amended complaint, said one-fourth being that portion of said land to which plaintiff claims to have derived title through Eugene Beebe; and, having disclaimed all interest in the subject-matter of the suit, he prays the judgment of this honorable court whether he be required to further answer.

GRAVES & BLAKEY,
Attorneys for Josiah Morris.

Filed Dec. 12, 1889.

J. W. DIMMICK, *Clerk.*

12 *Eugene Beebe Made a Party Defendant.*

MONDAY, *December 23rd*, 1889.

THE UNITED STATES
vs.
EUGENE BEEBE. } No. 57.

THE UNITED STATES
vs.
JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

On motion of A. A. Wiley, Esq., Eugene Beebe comes into court and suggests that he is the landlord of Sims Phillips and Adeline Thomas and asks to be made a party defendant to this suit; which motion is granted.

13 *Plea- No.* 1, 2, *&* 3.

U. S. Circuit Court for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE *et als.* } # 59.

Now come the defendant-, Eugene Beebe & Sims Phillips & Adeline Thomas, and for answer to the complaint filed in said cause says:

First. That *he is* not guilty of the matters alleged therein.

Second. And, further answering this complaint, these defendants say that the alleged title of the plaintiff and the only title which the said plaintiff has to the lands involved in this suit is claimed under a deed executed by one George Turner, marshal of the United States for the middle district of Alabama, at a pretended sale of said lands under an execution against the defendant Beebe had on, to wit, the 7th day of July, 1878; and defendant avers that he, the defendant, did not at the time of the levy of said execution nor at the time of the lien of the same, or of any prior execution issued on the same judgment attached to said property, have any such title to said property as was subject to levy and sale under execution.

Third. And, further answering said complaint, this defendant says that said plaintiff, The United States, had no title to nor interest in

the property sued for at the time this suit was commenced, nor has it any such title or interest at this time.

RICE & WILEY,
Att'ys for Def'ts.

Filed by leave of court this 23rd day of December, 1889.
J. W. DIMMICK, *Clerk.*

Motion to Strike Out 2d and 3d Pleas Filed by Defendant Eugene Beebe.

In U. S. Circuit Court, Middle District of Alabama.

THE UNITED STATES
vs.
JOSIAH MORRIS, EUGENE BEEBE, SIMS PHILLIPS, ADALINE THOMAS. } No. 59. In Ejectment.

Plaintiff moves to strike out the 2d and 3d pleas filed by defendant Eugene Beebe, because the same, as pleaded, simply deny plaintiff's title, and amount to the same as the plea of "not guilty;" and all the matters and things stated in said 2d and 3d pleas may be given in evidence under the plea of "not guilty," which has already been pleaded in that form.

May 14, 1890.

LEWIS E. PARSONS, JR.,
U. S. Att'y,
GEO. H. PATRICK,
Special Ass't U. S. Att'y,
Plaintiff's Attorneys.

To Messrs. Rice & Wiley, Tompkins & Troy, Graves & Blakey, defendants' attorneys.

14 *Order Consolidating this Case, No. 57, with Case No. 59.*

MONDAY, *May 19th*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE. } No. 57.

Upon motion of counsel for plaintiff, it is by the court ordered that this case be, and the same is hereby, consolidated with case number 59.

MONDAY, *May 19th*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, *et als.* } No. 59.

This case came on to be heard this day, and after the examination of several witnesses and during the trial of the case court adjourned until tomorrow morning at ten o'clock.

TUESDAY, *May 20th*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE *et als.* } No. 59.

During the trial of this case court adjourned until tomorrow morning at ten o'clock.

15 *Amendment to Complaint, Striking Out Claim for Rents and Profits.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59, as Consolidated. In Ejectment.

Plaintiff, by leave of the court first had and obtained, amends the complaint herein by striking out the words "together with twenty thousand dollars for the detention thereof."

L. E. PARSONS, JR.,
U. S. Attorney,
GEO. H. PATRICK,
Special Ass't U. S. Attorney,
Plaintiff's Attorneys.

Filed by leave of court May 20th, 1890.
J. W. DIMMICK, *Clerk.*

16 *Judgment.*

WEDNESDAY, *May 21st*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE *et als.* } No. 59.

This case came on further to be heard this day, and also came the jury heretofore empanneled, to wit, M. H. Parrish and eleven others, who, having been first duly elected, tried, and sworn to well and truly try the issues joined between the United States and Eugene Beebe and others and a true verdict render according to the evidence, upon their oaths do say: "We, the jury, find for the defendants." It is therefore considered by the court that the defendants go hence without day.

Order Granting Leave to Withdraw Certain Original Papers from the Files, etc.

In the Circuit Court of the United States for the Middle District of Alabama.

THURSDAY, *May 22nd*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

Upon motion of George H. Patrick, Esq., special assistant U. S. attorney, it is ordered that the original conveyance from Ferrie Henshaw to Eugene Beebe, dated February 23rd, 1878, introduced in evidence by plaintiff in the above-entitled cause, shall be retained by the clerk of this court in his custody, and that he shall keep the same in some secure place of deposit, but parties interested may
17 be permitted to have the same acknowledged and recorded.

It is further ordered that the original letter of Eugene Beebe to auditor P. O. Department, dated May 22nd, 1880, and the original affidavit of Eugene Beebe, dated March 24th, 1877, and the original deed from United States Marshal Turner to the United States shall be withdrawn from the files and be delivered to B. Chambers, Esq., in whose custody they are, to be returned to their proper place in the records at Washington upon plaintiffs having duly certified copies thereof, or in default thereof the clerk shall make and file certified copies of said originals.

In open court, May 22d, 1890.

DON A. PARDEE,
U. S. Cir. Judge.

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADALINE THOMAS. } No. 59. In Ejectment.

Comes the plaintiff, by attorney, and moves the court to grant a new trial in the above-entitled case upon the following grounds:

1st. Mistake of the court and misdirection to the jury as to the law of the case.

2d. The finding of the jury was contrary to the evidence.

3d. Because the finding of the jury is contrary to the charge of the court.

4th. Because the court erred in refusing to allow the execu- issued on the judgment in favor of plaintiff against the defendant Beebe,

dated January —, 1877, and the entries thereon, for the purpose of showing a lien in favor of plaintiff before date of conveyance by defendant Beebe to Henshaw, to go to the jury as evidence of title in plaintiff.

May 22d, 1890.

LEWIS E. PARSONS, JR., *U. S. Attorney,*
GEO. H. PATRICK, *Special Ass't U. S. Att'y,*
For Motion.

To A. A. Wiley, Tompkins & Troy, Watts and Watts, Graves & Blakey, Esqrs., attorneys for defendants.

Motion granted Nov. 6th, 1890.

DON A. PARDEE, *Judge.*

THE UNITED STATES,
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADALINE THOMAS. } No. 59. In Ejectment.

Plaintiff amends the motion heretofore made for a new trial by adding the following as paragraph

"5. Because plaintiff was surprised by the evidence of defendant Eugene Beebe and of newly discovered testimony in rebuttal of the same."

And it is further moved that the above stand continued until next term under the order made upon said original motion.

June 2d, 1890.

L. E. PARSONS, JR., *U. S. Att'y,*
GEO. H. PATRICK, *Sp'l Ass't U. S. Att'y,*
For Motion.

To Messrs. A. A. Wiley, Tompkins & Troy, Watts and Watts, Graves & Blakey, att'ys for defendants.

18 *Order Continuing Hearing Motion for New Trial until Next Term, with Leave to File Briefs and Bill of Exceptions in 60 Days.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59. In Ejectment.

In this cause, motion being made by plaintiffs for a new trial upon the ground—

1st. Of mistake of the court and misdirection to the jury as to the law;

2nd. That the finding of the jury is contrary to the evidence;

3rd. Because the finding of the jury is contrary to the charge of the court;

4th. Because the court erred in refusing to allow the execution issued on the judgment in favor of plaintiffs against the defendant Beebe, dated January —, 1877, and the entries thereon, for the purpose of showing a lien in favor of plaintiff before date of conveyance by defendant Beebe to Henshaw, to go to the jury as evidence of title in plaintiff—

It is ordered by the court that the same be submitted, with leave to either party to file briefs within sixty days, and plaintiff is also allowed sixty days within which to tender a bill of exceptions, and the court takes said motion under advisement and orders that said cause stand continued to the next term.

In open court, May 22d, 1890.

DON A. PARDEE,
U. S. Circuit Judge.

Filed May 22d, 1890.

J. W. DIMMICK, *Clerk.*

19 *Order Continuing Amended Motion for New Trial under Former Order of May 23d, 1890.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59. In Ejectment.

Plaintiff in the above-entitled cause now amending the motion for new trial by adding as paragraph

"5. Because plaintiff was surprised by the evidence of defendant Eugene Beebe and of newly discovered testimony in rebuttal of the same"—

It is ordered that the said above motion stand continued until next term, under the order heretofore, to wit, on May 23d, 1890, made upon said original motion.

June 6th, 1890.

DON A. PARDEE, *Judge.*

Filed and entered June 17, 1890.

J. W. DIMMICK, *Clerk.*

20 THURSDAY, *November 6th*, 1890.

Order Granting New Trial, etc.

THE UNITED STATES
vs.
JOSIAH MORRIS, EUGENE BEEBE, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

This cause was submitted upon briefs of counsel at the last term on motion by plaintiff for new trial, which was continued to the present term; and now, the same being understood, it is ordered that said motion be granted, and that the judgment and verdict in favor of defendants heretofore entered in said cause on. to wit, the 21st day of May, 1890, be, and the same hereby is, set aside, vacated, and held for naught as of the date so entered as aforesaid.

Order Setting Down Cases for Trial and Directing Drawing of Jury.

In the Circuit Court of the United States for the Middle District of Alabama.

THE UNITED STATES
vs.
EUGENE BEEBE *et als.*
STEPHEN SCHEUSSLER *et als.*
JOSIAH MORRIS *et als.*
MONTGOMERY LIGHT CO. *et als.*

Ordered by the court, upon motion of Mr. George H. Patrick, special assistant U. S. attorney, that the following cases, viz., No. 58, The United States *vs.* W. L. Brock and Eugene Beebe; No. 60, The United States *vs.* Stephen Scheussler, Eugene Beebe, *et als.*; No. 59, The United States *vs.* Josiah Morris, Eugene Beebe, *et als.*; No. 61, The United States *vs.* Montgomery Light Co. *et als.*, be, and the same are, set down to be tried on Monday, December 8, 1890.

It is further ordered that forty petit jurors be drawn without delay, in accordance with law, and that venire issue therefor, returnable on said 8th day of December, 1890.

In open court, November 7, 1890.

DON A. PARDEE,
U. S. Circuit Judge.

Filed November 7th, 1890.

J. W. DIMMICK, *Clerk.*

21 MONDAY, *December 8th*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, *et als.* } No. 59.

This day came the parties, by attorney, and also came a jury of twelve good and lawful men, to wit, B. T. Eley and eleven others. During the trial of the case court adjourned until tomorrow morning at 10 o'clock.

Judgment.

TUESDAY, *December 9th*, 1890.

THE UNITED STATES
vs.
EUGENE BEEBE, JOSIAH MORRIS, SIMS PHILLIPS, ADELINE THOMAS. } No. 59.

This day came the parties, by attorney, and, the defendant Josiah Morris having heretofore filed a disclaimer, which disclaimer is confessed by the plaintiff, it is considered by the court that said Josiah Morris be, and he is, discharged.

And thereupon came a jury of twelve good and lawful men, to wit, B. T. Eley and eleven others, who, being duly elected, empaneled, tried, and sworn well and truly to try the issue joined between the parties and a true verdict render according to the evidence, upon their oaths do say: "We, the jury, find for the plaintiff for the property sued for." It is therefore considered by the court that the plaintiff, The United States, have and recover possession of the property sued for, to wit, one undivided one-fourth interest in the following tract of land: The tract of land known as the Montgomery race track, near Montgomery, Alabama, containing eighty (80) acres, more or less, being all that certain tract of land commencing at a point thirty-nine hundred and sixty (3,960) feet, more or less, north of the east and west line between sections one (1) and twelve (12), township sixteen (16) north, range seventeen (17) east, and 605.3 feet, more or less, west of a point in the centre of the Western railway track where it is crossed by the public road which is a continuation of Court street, Montgomery, on the road or street leading from the Western railway track into the Fair or "Exposition" grounds, on the land of the Montgomery Land and Improve-
22 ment Company, and running along and on said road or street west nineteen hundred and eighty (1,980) feet; thence 17° 4′ to the right nine hundred and sixty-three (963) feet; thence 5° 23′ to the left thirteen hundred and forty (1,340) feet to a point near the east and west line between the north and south halves of the southeast quarter of section thirty-six (36), township seventeen (17) north, range seventeen (17) east; thence at a right angle east thirteen hundred and thirty (1,330) feet, more or less; thence south thirteen hundred and eighteen (1,318) feet; thence east along the line between said section thirty-six (36) and said section one (1) nine hundred and fifty (950) feet; thence in a southerly direction thirteen hundred and thirty (1,330) feet, more or less, to the place of beginning, being the same premises heretofore commonly known as the "Montgomery race track," and which was enclosed by a fence, said lands lying and being situated in the northeast quarter of section one (1), township sixteen (16) north, range seventeen (17) east, and in the southeast quarter of section thirty-six (36), township seventeen (17) north, range seventeen (17) east, all in the county of Montgomery and State of Alabama; and that a writ of *habere facias*

possessionem issue to place the plaintiff in possession thereof. It is also considered by the court that the plaintiff have and recover of the defendants the costs in this behalf expended, for which let execution issue.

23 *Bill of Exceptions.*

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1890.

THE UNITED STATES, Plaintiff,
vs.
JOSIAH MORRIS, EUGENE BEEBE, *et als.*, Defendants.

Be it remembered that on this the 9th day of December, 1890, and a day of the said November term, 1890, of said circuit court, the plaintiff joined issue on the several pleas filed by defendants except the disclaimer of the said Josiah Morris, which was confessed.

A jury was then empannelled and sworn well and truly to try the issue between the parties, and on the trial by jury the plaintiff offered the following testimony:

1. A deed executed by Josiah Morris and his wife, Sarah E. Morris, on the 14th day of June, 1873, which is in words and figures as follows, to wit:

Quitclaim Deed.

Josiah Morris and wife, Sarah E. Morris,
to
Eugene Beebe and Ferrie Henshaw.

THE STATE OF ALABAMA,
Montgomery County.

Know all men by these presents, that I, Josiah Morris, of said State and county, for and in consideration of the sum of one dollar to me in hand paid by Eugene Beebe and Ferrie Henshaw, of said State and county, the receipt of which is hereby acknowledged, have remised, released and quitclaimed, and by these presents do remise, release and quitclaim unto the said Beebe and Henshaw, their heirs and assigns, an undivided one-half interest in the following-described lots or parcels of land, to wit:

The west half of the northeast ¼ of the northeast ¼ of fractional section in township sixteen, range seventeen, east of the Alabama river, being lot number seven as surveyed by Brice Battle, containing nineteen (19) acres; also the east half of the southwest ¼ of northeast ¼ of lot "A" fractional section one, township sixteen, range 17, east of the Alabama river, being lot number six as surveyed by Brice Battle, and containing nineteen acres; also the west ½ of the northwest ¼ of lot "A" fractional section one (1), township 16, range 17, east of the Alabama river, and described as lot number five on a plat of said lot "A," the said lot being in the northwest corner of

the southeast ¼ of said fractional section "A," and containing
24 twenty acres, more or less; also the west ½ of the south ½ of
southeast ¼ of section 36, township 17, range 17, containing forty acres, more or less;

To have and to hold an undivided one-half of the aforegranted lots or parcels of land herein described, with the privileges and appurtenances thereunto belonging, or in anywise appertaining thereunto, unto the said Beebe and Henshaw, their heirs and assigns, to them and their heirs and assigns forever: so that neither I, the said Josiah Morris, nor my heirs, nor any person or persons claiming by or through or under me or them, shall by any way or means, have, claim or demand any right or title to the said undivided one-half of said premises and appurtenances hereby conveyed nor to any part thereof, to wit: said undivided one-half so sold to them; and for and in consideration of the purchase-money herein stated, as also for divers other good and valuable considerations me thereto moving, I, Sarah E. Morris, wife of the said Josiah Morris, do hereby remise, release and quitclaim unto the said Eugene Beebe and Ferrie Henshaw, their heirs and assigns, all the right, title and interest, claim and demand that I now have as the widow of said Josiah Morris or may hereafter have as his widow to dower in and to the one undivided half of the lands herein set forth and conveyed to them.

In witness whereof we, the said Josiah Morris and Sarah E. Morris, do hereunto set our hands and affix our seals, this the 14th day of June, A. D. 1873.

JOSIAH MORRIS. [SEAL.]
SARAH E. MORRIS. [SEAL.]

Signed, sealed, and delivered in presence of—

M. H. SMITH.
F. M. BILLING.

STATE OF ALABAMA, }
Montgomery County. }

I, Wm. J. Cameron, a notary public and *ex officio* justice of the peace in and for said county, hereby certify that F. M. Billing, a subscribing witness to the foregoing conveyance, known to me, appeared before me on this day and, being sworn, stated that Josiah Morris and Sarah E. Morris, the grantors in the conveyance, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date; that he attested the same in the presence of the grantors and the other witness, and that such other witness subscribed his name as a witness in his presence.

Given under my hand this 14th day of June, 1873.

WM. J. CAMERON,
N. P. and ex Officio J. P.

STATE OF ALABAMA,
Montgomery County.

OFFICE OF THE JUDGE OF PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 24th day of August, 1875, at 10 o'clock a. m., and duly recorded in Book 7 of Deeds, page 281, and examined.

C. W. BUCKLEY,
Judge of Probate Court, Montgomery County.

Defendants here admitted at the time of the execution of said deed Josiah Morris, the grantor therein, was seized and possessed of the lands described therein and thereby conveyed and sued for.

2. Plaintiff then introduced in evidence the original minutes of the circuit court of the United States for the middle district of Alabama containing judgment entries of said court, copies of which are hereto attached, marked Exhibits A and B, and made a part of this bill of exceptions, with leave to refer thereto as often as may be necessary.

3. Plaintiff then introduced in evidence two executions, with the endorsements thereon—one in the case of The United States *vs.* Charles H. Davis, Eugene Beebe, *et als.*, issued on the 10th day of May, 1877, and the other in the case of The United States *vs.* Eugene Beebe, C. C. Sheets, *et als.*, issued on the 10th day of May, 1877—copies of which executions, together with the endorsements thereon, are hereto attached, marked Exhibits C and D respectively, and made a part of this bill of exceptions, with leave to refer thereto as often as may be necessary.

4. Plaintiff then introduced in evidence a deed executed by George Turner, U. S. marshal, to the United States on the 2d day of July, 1877, a copy of which, with the endorsements thereon, is hereto attached, marked Exhibit E, and made a part of this bill of exceptions, with leave to refer thereto as often as may be necessary.

The plaintiff here closed.

The defendants then introduced in evidence a deed executed by the defendant Beebe and Ferrie Henshaw on the 22d day of March, 1877, a copy of which, with the endorsements thereon, is hereto attached, marked Exhibit F, and made a part of this bill of exceptions, with leave to refer thereto as often as may be necessary.

Plaintiff objected to the introduction of the said deed in evidence upon the following grounds, to wit:

1st. That it is a mortgage.

2d. That it is void upon its face.

3d. That it is void upon its face as against the United States.

4th. That it sets up no claim superior to that of the United States.

5th. That it sets up no claim superior to the title of the United States acquired at the execution sale.

6th. That there is no offer to show a foreclosure under it.

Defendants then had Eugene Beebe sworn as a witness and stated to the court that he intended and proposed to prove by the said

Beebe, in connection with the said deed and to support the
26 same, the following facts:

1st. That at the time of the execution of said deed offered in evidence the said Beebe and the said Ferrie Henshaw were and for many years prior thereto had been in partnership, doing business under the name and style of E. Beebe & Co.

2d. That at the date of the execution of said instrument the said partnership of E. Beebe & Co. was indebted to various persons in amounts aggregating forty thousand dollars; that, in addition to that, the said defendant, Beebe, was indebted to the said Henshaw about two thousand dollars individually, and was indebted to him on account of partnership matters about two thousand dollars in addition.

3d. That the property involved in this suit was purchased while the said Beebe and the said Henshaw were partners as aforesaid, and was purchased with partnership assets.

4th. That said deed had been delivered to and accepted by the said Ferrie Henshaw. In connection with this offer defendants admitted that Henshaw had never sold any of the property conveyed by the deed and nothing had been done thereunder.

Defendants had the said Beebe on the stand and stated that they proposed to prove by him all the several facts hereinabove enumerated in connection with the deed offered in evidence, offered to prove said facts in connection therewith.

The court thereupon sustained the objection of the plaintiff to the introduction of said deed as evidence and refused to allow the same to be read in evidence to the jury by the defendants as evidence for the defendants in this cause.

To this action of the court in sustaining the objection of plaintiff to the introduction of said deed as evidence by defendants the defendants then and there duly excepted in the presence and hearing of the jury.

Thereupon plaintiff offered in evidence a deed executed by Ferrie Henshaw to Eugene Beebe, the defendant, on the 23d day of February, 1878, a copy of which is hereto attached, marked Exhibit G, and made a part of this bill of exceptions, with leave to refer thereto as often as may be necessary.

In connection with the said deed, defendants proved by the said
Beebe, defendant, that after the 22d day of March, 1877, the
27 habits of the said Henshaw became very bad; that he was often under the influence of liquor and incapable of attending to business; that thereupon he, the said Beebe, procured the said Henshaw to execute the said deed of February 23d, 1878; that in truth and in fact at that time the debts and business affairs of the said partnership of E. Beebe & Co. had not been settled and paid.

It was agreed and admitted by all the parties in open court that the interest claimed by the United States in the property described in the complaint was at the time the complaint was filed worth exceeding five thousand dollars and is now worth fifty thousand dollars.

The foregoing was in substance all the evidence introduced or

offered to be introduced on the trial of this cause, and upon the foregoing evidence the court charged the jury that if they believed the evidence the plaintiff was entitled to recover the land sued for in the complaint filed in this cause.

The defendants duly excepted to this charge of the court before the jury retired and in the presence and hearing of the jury, and offered to state the grounds and causes in law for such exception, but the court relieved the defendants from stating the grounds and causes of this exception to this charge.

And the defendant Eugene Beebe tenders this his bill of exceptions, which is signed, sealed, and allowed as such by the presiding judge in open court, and during the said November term, 1890, of said circuit court of the United States, on this the 9th day of December, 1890.

(Signed) DON A. PARDEE,
Circuit Judge.

28 EXHIBIT A.

THE UNITED STATES
vs.
EUGENE BEEBE, C. C. SHEETS, W. W. GLASS, M. G. CANDEE, B. F. ROYAL, JOHN C. CHAPMAN, L. S. SPEED. } No. 5.

$1,686.68. Stay of ex. till 25th March, 1877. R.

This day came The United States, by Charles E. Mayer, Esq., U. S. attorney, and also came John C. Chapman, by his attorneys, Rice, Jones & Wiley, who now enter an appearance for said defendant, and the said defendants Beebe, Sheets, Glass, Candee, and Royal, who have each been served with process herein, withdrawing, by their attorneys, Rice, Jones & Wiley, all pleas filed and saying nothing further in bar or preclusion of the plaintiff's demand, and it appearing to the court that the plea of *non est factum* as to defendant L. S. Speed has been sustained at a former term of the said court, and said defendants except said L. S. Speed, being called, came not, but made default, it is therefore considered by the court that the said defendant, L. S. Speed, go hence without day, and that the said plaintiff recover of the other defendants in this cause the demand of their complaint mentioned, but the same being uncertain, a writ of inquiry is awarded to ascertain the same.

Thereupon came a jury of good and lawful men, to wit, M. P. Blue and eleven others, who, being duly empaneled, sworn, and charged to well and truly assess the damages of the said plaintiff and a true verdict render according to the evidence, upon their oaths do say:

"We, the jury, find for the United States on the writ of inquiry fourteen hundred and ninety-eight & $\frac{15}{100}$ dollars, principal of the debt and damage; interest, one hundred and eighty-eight & $\frac{53}{100}$ dollars; aggregate, one thousand six hundred and eighty-six & $\frac{68}{100}$ dollars, against Eugene Beebe, C. C. Sheets, William W. Glass, M. G. Candee, John C. Chapman, & Benjamin F. Royal, defendants."

It is therefore considered by the court that the said plaintiff recover of the said defendants the said sum of one thousand
29 six hundred and eighty-six & $\frac{68}{100}$ dollars, their damages as assessed by the jury aforesaid, together with the costs in this behalf expended, for which let execution issue.

And by consent this execution is stayed until the 25th day of March, A. D. 1877.

EXHIBIT B.

THE UNITED STATES
vs.
CHARLES H. DAVIS, EUGENE BEEBE, C. C. SHEETS, W. W. Glass, M. G. Candee, L. S. Speed, B. F. Royal, and John C. Chapman. } #2.

$991.00. Ex. stayed till 25th March, 1877. (R.)

This day came the United States, by Charles E. Mayer, Esq., U. S. district attorney, and also came all the defendants against whom process issued, to wit, Charles H. Davis, Esq., Eugene Beebe, C. C. Sheets, W. W. Glass, M. G. Candee, L. S. Speed, B. F. Royal, and John C. Chapman, by Rice, Jones & Wiley, their attorneys, who now enter an appearance for each and all of said defendants, and the special plea of *non est factum* of L. S. Speed is withdrawn, and said defendants withdrawing all pleas filed herein; and said defendants, being called, came not but made default. It is therefore considered by the court that the said plaintiff recover of the said defendants named the demand in plaintiff's complaint mentioned, but the same being uncertain, a writ of inquiry is awarded to ascertain the damages. Thereupon came a jury of good and lawful men, to wit, M. P. Blue and eleven others, who, being duly empaneled and sworn to well and truly assess the damages of said plaintiff and a true verdict render according to the evidence, upon their oaths do say: "We, the jury, find for the United States in the writ of inquiry eight hundred and seventy-six & $\frac{60}{100}$ —, principal of the debt, and assess the damages—interest, one hundred and fourteen and $\frac{40}{100}$ dollars—against the defendants named in the writ; total, nine hundred and ninety-one dollars. It is therefore considered by the court that the said plaintiff recover of the said defendants the said sum of nine hundred and ninety-one dollars, their damages as assessed by the jury aforesaid, together with the costs in this behalf expended, for which let execution issue.

And by consent execution is stayed until the 25th day of March, A. D. 1877.

30 EXHIBIT C 1.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

The President of the United States to the marshal of said district, Greeting:

Again you are hereby commanded that of the goods and chattels, lands and tenements, of Charles H. Davis, Eugene Beebe, C. C. Sheets, W. W. Glass, M. G. Candee, L. S. Speed, B. F. Royal, and John C. Chapman, of said district, you cause to be made the sum of nine hundred and ninety-one dollars, with interest thereon from the 19th day of December, A. D. 1876, which the United States, at a term of said court began and held on the first Monday of November, A. D. 1876, has recovered against the said defendants for its damages; also the sum of forty-four and $\frac{65}{100}$ dollars, which to the said United States in the same court are adjudged for costs and charges in that behalf expended, whereof the said defendants are convicted, as appears of record, and that you have the said sum of money before the said circuit court on the first Monday of November next, at the place of holding said court, at Montgomery, to render to the said The United States for its damages and costs aforesaid; and have you then and there this writ.

Witness Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Issued the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Ala.

31 (Endorsed:) *Alias fi. fa.* No. 74. The United States *vs.* Charles H. Davis, Eugene Beebe, *et als.* Circuit court of the United States, middle district of Alabama. Judgment, $991.00; interest from 19th Dec'r, 1876, $—; cost, $44.65. No. 2. P. 426. Filed Nov. 5th, 1877. J. W. Dimmick, clerk. —— ——, U. S. dist. att'y, plaintiff's attorney.

The property of the defendant Candee described in the levy herein was on the second day of July, 1877, sold to H. A. Candee for one thousand dollars, which sum has been by me covered into the Treasury of the United States.

GEORGE TURNER,
U. S. Marshal.

Clerk's fees	$8 65
Marshal's fees	16 00
Attorney's tax fee	20 00
Fees of —	
Fees of —	
(Total)	$44 65

Received in office May 10, 1877.

GEO. TURNER,
U. S. Marshal.

To satisfy the within judgment I have, this 10th day of May, 1877, levied upon the following-described property, to wit:

1st. An undivided half interest in lot and store No. 41 Market street.

2d. The tract of land known as the Montgomery race track, near Montgomery, Ala., containing 80 acres, more or less.

3d. The lot and storehouse known as the "bakery," on Perry street between Market and Monroe streets.

4th. The lot and storehouse known as "Cashin's," on Perry street between Market and Monroe streets.

5th. The lot and building No. 16 Perry street, occupied as law office by Watts & Son and Rice, Jones & Wiley.

6th. The lot and building No. 28 Market street, known as the "Rialto," all in the city of Montgomery and State of Alabama, as the property of the defendant Eugene Beebe; also a twelfth interest—that is to say*d*, 83 shares—of the capital stock of the East Alabama Mining and Smelting Company, situated in the counties of Randolph and Cleburne, State of Alabama, as the property of the defendant M. G. Candee.

GEORGE TURNER,
U. S. Marshal.
F. JOST, *Dep.*

Received in office January 23d, 1877.

GEO. TURNER,
U. S. Marshal.

To satisf*ay* the within execution I have levied, this 5th day of April, 1877, on an undivided half interest in the following-described property, to wit:

1st. An undivided half interest in the lot and store No. 41 Market street.

2nd. The tract of land known as Montgomery race track, near Montgomery, containing 80 acres, more or less.

3rd. The lot and storehouse — as the "bakery," on Perry street between Market and Monroe streets.

4th. The lot and storehouse known as Cashin's, on Perry street between Market and Monroe streets.

5th. The lot and building No. 16 Perry street, occupied as a law office by Watts & Sons and by Rice, Jones & Wiley.

Ex. C 2.
32

6th. The lot and building No. 28 Market street, known as the "Rialto," all in the city of Montgomery and State of Alabama, as the property of the defendant Eugene Beebe. Notice in writing given the defendant.

GEO. TURNER,
U. S. Marshal.

To satisfy the within execution I have, this fifth day of April, 1877, levied on a twelfth interest—that is to say, 83 shares, more or less—of the capital stock of the East Alabama Mining and Smelting Company, situated in Randolph and Cleburne counties, State of Alabama, as the property of the defendant Marshal G. Candee.

Notice in writing given to the defendant.

GEO. TURNER,
U. S. Marshal.
F. JOST, *Dep.*

Returned for alias, not advertised, and sold for want of time. April 6th, 1877.

GEO. TURNER,
U. S. Marshal,
P'r F. JOST, *Dep.*

UNITED STATES OF AMERICA, *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, do hereby certify the foregoing page to contain a true copy of the return of the marshal on the execution issued next last preceding this in the aforesaid cause as the same appears of record and on file in my office as clerk of said court.

Witness my hand and official — this 10th day of May, A. D. 1877.

[SEAL.] J. W. DIMMICK, *Clerk.*

Ex. C 3.

33

EXHIBIT D.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

The President of the United States to the marshal of said district, Greeting:

Again you are hereby commanded that of the goods and chattels, lands and tenements, of Eugene Beebe, C. C. Sheets, W. W. Glass, M. G. Candee, Benjamin F. Royal, and John C. Chapman, of said district, you cause to be made the sum of sixteen hundred and eighty-six & $\frac{68}{100}$ dollars, with interest thereon from the 19th day of December, A. D. 1876, which the United States, at a term of said court began and held on the first Monday of November, A. D. 1876, has recovered against said defendants for their damages; also the sum of forty-seven & $\frac{15}{100}$ dollars, which to the said The United

States in the same court are adjudged for costs and charges in that behalf expended, whereof the said defendants are convicted, as appears of record, and that you have the said sum of money before the said circuit court on the first Monday of November next, at the place of holding said court, at Montgomery, to render to the said The United States for their damages and costs as aforesaid; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] Issued the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Ala.

Ex. D 1.

34 (Endorsed:) *Alias fi. fa.* No. 75. The United States *vs.* Eugene Beebe, C. C. Sheets, *et als.* Circuit court of the United States, middle district of Alabama. Judgment, $1,686.68; interest from Dec'r 19, 1876, $—; cost, $47.15; (total), $—. No. 5. P. 425. Filed Nov. 5th, 1877. J. W. Dimmick, clerk. —— ——, U. S. dist. att'y, plaintiff's attorney.

The property of the defendant M. G. Candee was sold to H. A. Candee for one thousand dollars ($1,000) on the 2d day of July, 1877, which amount was by the marshal covered into the Treasury of the United States.

GEORGE TURNER,
U. S. Marshal,
By F. JOST, *Dep.*

Received in office May 10th, 1877.

GEO. TURNER,
U. S. Marshal.

To satisfy the within execution I have, this 10th day of May, 1877, levied upon the following-described property, to wit:

1st. An undivided half interest in lot and store No. 41 Market street.

2d. The tract of land known as the Montgomery race track, near Montgomery, Ala., containing 80 acres, more or less.

3d. The lot and storehouse known as the "bakery," on Perry street between Market and Monroe streets.

4th. The lot and store known as "Cashin's," on Perry street between Market and Monroe streets.

5th. The lot and building No. 16 Perry street, occupied as law offices by Watts & Sons and Rice, Jones & Wiley.

6th. The lot and building No. 28 Market street, known as the "Rialto," all in the city of Montgomery and State of Alabama, as the property of the defendant Eugene Beebe; also a twelfth interest—that is to say, 83 shares—of the capital stock of the East Alabama

Mining and Smelting Company, situated in the counties of Randolph and Cleburne, State of Alabama, as the property of the defendant M. G. Candee.

Notice in writing given to the defendant.

GEORGE TURNER,
U. S. Marshal.
F. JOST, *Dep.*

Received in office January 23d, 1877.

GEO. TURNER,
U. S. Marshal.

To satisfy the within execution I have levied, this 5th day of April, 1877, on an undivided one-half interest in the following-described property, to wit:

1st. An undivided interest in the lot and storehouse No. 41 Market street.

2d. The tract of land known as the Montgomery race track, near Montgomery, containing 80 acres, more or less.

3d. The lot and storehouse known as the "bakery," between Market and Monroe streets.

4th. The lot and storehouse known as "Cashin's," on Perry street between Market and Monroe streets.

5th. The lot and building No. 16 Perry street, occupied as a law office by Watts & Sons and by Rice, Jones and Wiley.

6th. The lot and building No. 28 Market street, known as the "Rialto," all in the city of Montgomery, State of Alabama, as the property of the defendant Eugene Beebe.

Notice in writing given the defendant.

GEO. TURNER,
U. S. Marshal.

Ex. D 2.

35 To satisfay the within execution I have levied, this 5th day of April, 1877, on a twelfth interest—that is to say, 83 shares—of the capital stock of the East Alabama Mining and Smelting Company, situated in Randolph and Cleburne counties, State of Alabama, as the property of the defendant Marshal G. Candee. Notice in writing given the defendant.

GEO. TURNER,
U. S. Marshal.

Returned for alias. Not advertised and sold for want of time. April 6th, 1877.

GEO. TURNER,
U. S. Marshal,
P'r F. JOST, *Dep.*

UNITED STATES OF AMERICA, *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, do hereby certify the foregoing page to contain a true copy of the return of the marshal on the ex-

ecution issued next last preceding this in the aforesaid cause as the same appears of record and on file in my office as clerk of said court.

Witness my hand and official seal this the 10th day of May, A. D. 1877.

[SEAL.] J. W. DIMMICK, *Clerk.*

Ex. D 3.

36 EXHIBIT E.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Middle District of Alabama.

Whereas an execution issued from the clerk's office of the circuit court of the United States for the middle district of Alabama in favor of the United States against Charles H. Davis, Eugene Beebe, C. C. Sheets, W. W. Glass, M. G. Candee, L. S. Speed, B. F. Royal, and John C. Chapman was, while the same was in full force, levied by me, as marshal of the court aforesaid for said middle district of Alabama, on the following as the property of the said Eugene Beebe, to wit, an undivided half interest in the lot and storehouse No. 41 Market street, in the city of Montgomery; the lot and building No. 16 Perry street, in the city of Montgomery, Alabama, occupied as law office by Watts and Sons and Rice, Jones & Wiley; the lot and building No. 28 Market street, in the city of Montgomery, Alabama, known as the "Rialto;" the lot and storehouse on Perry street between Market and Monroe streets, in the city of Montgomery, Alabama, known as "Cashin's;" the tract of land known as the Montgomery race track, near Montgomery, Alabama, containing 80 acres, more or less; and

Whereas said property, having been duly advertised for sale, as required by law, was sold by me, as marshal as aforesaid, on the second day of July, 1877, before the artesian basin, in the city of Montgomery, to the United States, who became the highest and best bidder for the sum of one thousand (1,000) dollars:

Now, therefore, be it known that, in consideration of the premises and the payment of the sum of money above mentioned, I do hereby sell and convey unto the said United States all the legal right, title, interest, and claim which the said Eugene Beebe had and held in and to the property above described.

37 In testimony whereof I hereunto set my hand and affix my seal this second day of July, A. D. 1877.

GEORGE TURNER, [SEAL.]
U. S. Marshal.

THE STATE OF ALABAMA, }
Montgomery County. }

I, John B. Fuller, a justice of the peace for said county and State, hereby certify that George Turner, U. S. marshal, whose name is signed to the foregoing conveyance and who is known to me, ac-

knowledged before me, on this day, that, being informed of the contents of the conveyance, he, as marshal, executed the same voluntarily on the day the same bears date.

Given under my hand this 8th day of Oct'r, A. D. 1877.

JNO. B. FULLER, *J. P.*

(Endorsed:) George Turner, U. S. marshal, to the United States. Deed.

THE STATE OF ALABAMA, }
Montgomery County. }

OFFICE OF THE JUDGE, PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 16th day of May, 1878, at 12 o'clock m., and duly recorded in Book 9 of Deeds, page 406, and examined.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

Mem., U. S. — Charles H. Davis, Eugene Beebe, et als.

Judgment	$991 00
Costs on execution	44 65
	$1,035 65

Mem., U. S. v. Eugene Beebe et als.

Judgment	$1,686 68
Costs on execution	47 15
	$1,733 83
Advertising	12 50

Ex. E 2.

38 EXHIBIT F.

STATE OF ALABAMA, }
Montgomery County. }

Whereas a copartnership has existed for many years in the city of Montgomery and county and State aforesaid between Eugene Beebe and Ferrie Henshaw, under the name and style of E. Beebe & Co.; and whereas the said firm of E. Beebe & Co. is indebted to various persons, and the said Eugene Beebe on a settlement of the affairs and business of said firm will be largely indebted to it, and also to Ferrie Henshaw, for monies advanced and paid out by him in excess of his proportion as said partner for the debts of said firm, the precise amount of which cannot be ascertained until the debts of said firm are paid and a settlement is had b-een said Beebe and said Henshaw of all the matters relating to said partnership;

And whereas the said Eugene Beebe and Ferrie Henshaw are the

owners as said partners, under said name of E. Beebe & Co., of the following real estate in the city of Montgomery and county and State aforesaid, to wit, the west half of lot No. 7, on the south side of Market street, being twenty-five feet front on Market street and running back one hundred and ten feet, and also twenty-five feet east and west by twenty-five feet north and south of the northwest corner of lot No. 7, on the west side of Perry street, the whole known as the "Rialto," and which is mortgaged to Mrs. Mary Glasscock for four thousand five hundred dollars; also one undivided half of the three-story brick store on the north side of Market street, numbered 41, and of the lot on which said store is built, Stephen Scheussler being the owner of the other half of said store and lot; also one undivided half of the building and lot on which said building is erected, on the west side of Perry street, occupied by James T. Holtzclaw as a law office, he owning the other — of said building and lot; also the west end of the said lot, which is No. 7, on which said office is built, being twenty feet in width north and south and running back one hundred feet, with the privilege of an alley; also those parts of lots No. 7 & 8 fronting twenty-five feet on Perry street and occupied by Mess. Rice, Jones and Wiley and Watts and Watts as law offices; also lots No. 8 and 3, in square No. 14, on the north side of Commerce street, fronting twenty-five feet on Commerce street, beginning twenty-five feet from the northwest corner of said lot No. 8, thence running northeast one hundred and sixty feet to an alley, thence southeast along said alley twenty-five feet, thence southwest one hundred and sixty feet to Commerce street, and thence along Commerce street to the beginning; also the south twenty feet of the lot on which Washington hall, on the west side of Perry street, is situated and fronting twenty feet on Perry street and running back seventy-five feet, part of Washington hall being on said twenty feet; also one undivided half interest in a tract of land called "the old Montgomery race track," about two miles from said city of Montgomery, and containing eighty acres, the other half being owned by Josiah Morris; also lots No. one, two, three, and four, in square nineteen, of Scott's plat of the city of Montgomery; and whereas the said firm of E. Beebe & Co. also own the following personal property, to wit, a steam launch, now lying at the wharf in said city of Montgomery, called "Enterprise of Montgomery," and the stock, fixtures, furniture, billiard tables and appurtenances, and stock of liquors, barrels, and glasses on hand in the building in said city called "The Rialto:"

Now, therefore, in consideration of the premises and to protect and secure the creditors of said firm, and to enable the said Henshaw the more easily and readily to settle and pay the debts of said firm,

39 and to protect and secure the said Ferrie Henshaw for the monies he has advanced and paid out for said firm of E. Beebe & Co. in excess of his proportion thereof, and to protect and secure him for all the monies I may owe said firm or said Henshaw on a settlement between us of the affairs and business of said firm, I, the said Eugene Beebe, have granted, bargained and sold, and conveyed, and do hereby grant, bargain, sell, and convey, all my interest and estate in the above-described real and personal

property, as said partner or otherwise, to the said Ferrie Henshaw, in trust, to sell the same at such times and places and on such terms, on credit or for cash, or for part cash and part credit, and at private or public sale, as the best interests of the said creditors of said firm and of him and myself as he may determine, and to apply the proceeds thereof to the payment of the debts of the said firm and to the payment of what I may be found indebted to said firm or to said Ferrie Henshaw on the settlement between us of the affairs and business of said firm, and if any excess should remain in his hands from the sale of said property after the payment of said debts of said firm and of what I may owe the said firm or owe him on the said settlement of the business and affairs of said firm, then he shall pay back to me such excess; and if there should remain in his hands any of said property not required to be sold for the purposes aforesaid, then on such final settlement between us he shall reconvey the same to me, my heirs or assigns.

In witness whereof I, the said Eugene Beebe, have hereunto set my hand and seal this the 22d day of March, A. D. 1877.

EUGENE BEEBE. [SEAL.]

Signed, sealed, and delivered in the presence of—

J. A. ELMORE.
GUS. DYER.

Probate Court.

THE STATE OF ALABAMA, }
Montgomery County. }

I, Charles W. Buckley, judge of the probate court in and for the county and State aforesaid, hereby certify that Eugene Beebe, whose name is signed to the foregoing conveyance, known to me, acknowledged before me on this day that, being informed of the contents of the said conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 23d day of March, A. D. 1877.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

(Endorsed:) Eugene Beebe to Ferrie Henshaw. Deed.

THE STATE OF ALABAMA, }
Montgomery County. }

OFFICE OF THE JUDGE, PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 23d day of March, 1877, at 3 o'clock p. m., and duly recorded in Book 8 of Deeds, page 566, and examined.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

Ex. F 2.

40 EXHIBIT G.

THE STATE OF ALABAMA, }
Montgomery County. }

Know all men by these presents that whereas, on the 22d day of March, A. D. 1877, Eugene Beebe and Ferrie Henshaw, partners doing business together under the firm name and style of E. Beebe & Co., were joint owners of the following real and personal property, to wit, the west half of lot No. 7, on the south side of Market street, being twenty-five feet front on Market street and running back one hundred and ten feet, and also twenty-five feet north and south of the northwest corner of lot No. 7, on the west side of Perry street, the whole known as "The Rialto," and which is mortgaged to Mrs. Mary Glasscock for four thousand five hundred dollars; also one undivided half of the three-story brick store on the north side of Market street, numbered 41, and of the lot on which said store is built, Stephen Scheussler being the owner of the other half of said store and lot; also one undivided half of the building and lot on which the said building is erected, on the west side of Perry street, occupied by James T. Holtzclaw as a law office, he owning the other half of said building and lot; also the west end of said lot, which is No. 7, on which said office is built, being twenty feet in width north and south and running back one hundred feet, with the privilege of an alley; also those parts of lots No. 7 & 8 fronting twenty-five feet on Perry street and occupied by Messrs Rice, Jones & Wiley and Watts and Sons as law offices; also lots No. 8 and 3, in square 14, on the north side of Commerce street, beginning twenty-five feet from the northwest corner of said lot No. 8, thence running northeast one hundred and sixty feet to an alley, thence southeast along said alley twenty-five feet, thence southwest one hundred and sixty feet to Commerce street, and thence along Commerce street to the beginning; also the south twenty feet of the lot on which Washington hall, on the west side of Perry street, is situated and fronting twenty feet on Perry street and running back seventy-five feet, part of Washington hall being on said twenty feet; also one undivided half interest in a tract of land called "the old Montgomery race track," about two miles from the city of Montgomery, and containing eighty acres, the other half being owned by Josiah Morris; also lots No. one, two, three, and four, in square nineteen, of Scott's plat of the city of Montgomery, all of said lands lying and being situate in said county and State; and also owned the following personal property, to wit, a steam launch, now lying at the wharf in the city of Montgomery, called "Enterprize of Montgomery," and the stock, fixtures, furniture, billiard tables, and appurtenances and glasses on hand in the building in said city called "The Rialto;" and

Whereas the said Eugene Beebe, on the said 22d day of March, A. D. 1877, did convey to the said Ferrie Henshaw, by instrument in writing, all of his interest and estate in said above-described real and personal property for the purpose of paying the debts and settling the

liabilities and business affairs of said partnership of E. Beebe & Co., composed as aforesaid, upon the express condition that upon the settlement of the same the said Ferrie Henshaw should reconvey to the said Eugene Beebe his (the said Eugene Beebe's) interest and estate in said property remaining on hand and not required to be sold for the purposes aforesaid; and

Whereas the debts and business affairs of said partnership of E. Beebe & Co. *has* been fully settled with money realized from said property, real and personal, hereinabove described, as heretofore conveyed by said Eugene Beebe to said Ferrie Henshaw, as
41 aforesaid, without the necessity of having to sell any of said property either real or personal, for the purposes aforesaid.

Now, therefore, I, the said Ferrie Henshaw, for and in consideration of the premises, as aforesaid, and in further consideration of ten dollars, to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Eugene Beebe one undivided one-half interest in and to the above-described property, both real and personal, as aforesaid.

Witness my hand and seal this 23d day of February, 1878.

FERRIE HENSHAW. [SEAL.]

Witnesses:

ARIOSTO A. WILEY.
J. E. HARRIS.

Ex. G 2.
Filed in open court this 9th day of December, 1890.

J. W. DIMMICK, *Clerk.*

42 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America, plaintiff, and Eugene Beebe, Josiah Morris, Sims Phillips, and Adeline Thomas, defendants, a manifest error hath happened, to the great damage of the said Eugene Beebe, Sims Phillips, and Adeline Thomas, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and

proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of February, in the year [L. S.] of our Lord one thousand eight hundred and ninety-one.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—
DON A. PARDEE,
Circuit Judge.

Filed the 7th day of February, A. D. 1891.

J. W. DIMMICK, *Clerk.*

43 *Bond.*

Know all men by these presents that we, Eugene Beebe, F. M. Billing, and W. F. Yandiver, of the State of Alabama and county of Montgomery, are held and firmly bound unto the United States of America in the full and just sum of twenty thousand dollars, to be paid to the said The United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the November term, 1890, of the circuit court of the United States for the middle district of Ala., in a suit pending in said court between the said The United States of America, as plaintiff, and the said Eugene Beebe, Josiah Morris, Sims Phillips, and Adeline Thomas, as defendants, a judgment was rendered against the said Eugene Beebe, Sims Phillips, and Adeline Thomas for an undivided fourth interest in the following-described real estate, situate in the county of Montgomery, Ala., to wit, being the same premises heretofore commonly known as the "Montgomery race track," containing 80 acres, being situated in N. E. ¼ of sec. 1, T. 16 N., R. 17 E., and in the S. E. ¼ of sec. 36, T. 17 N., R. 17 E.; and the said Eugene Beebe, Sims Phillips, and Adeline Thomas having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Eugene Beebe, Sims Phillips, and Adeline Thomas shall prosecute said writ of error to effect and answer all damages and costs if they

fail to make their plea good, then the above obligation to be
44 void; else to remain in full force and virtue.

(Signed) EUGENE BEEBE. [L. S.]
" F. M. BILLING. [L. S.]
" W. F. VANDIVER. [L. S.]

Sealed and delivered in presence of—
FRED. S. BALL.

Approved by—
DON A. PARDEE,
Circuit Judge.

Filed the 7th day of February, A. D. 1891.
J. W. DIMMICK, *Clerk.*

45 *Citation.*

UNITED STATES OF AMERICA:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein Eugene Beebe, Sims Phillips, and Adeline Thomas are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of
[L. S.] the Supreme Court of the United States, this 5th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

DON A. PARDEE,
Circuit Judge, 5th Circuit.

Received in office Feb. 7th, 1891.
B. W. WALKER,
U. S. Marshal.

Executed a copy of the within citation on G. H. Patrick, special ass't U. S. attorney, by leaving at his house this 7th day of February, 1891.

B. W. WALKER,
U. S. Marshal,
By L. D. COX.

Returned and filed February 12, 1891.
J. W. DIMMICK, *Clerk.*

I hereby accept service and waive copy this Feb'y 13th, 1891.
L. E. PARSONS, JR.
U. S. Attorney.

46 UNITED STATES OF AMERICA, } ss:
Middle District of Alabama, }

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, hereby certify that the foregoing pages, numbered from one to 45, inclusive, contain a full, true, and complete transcript of the record and proceedings in case of The United States of America against Eugene Beebe, Sims Phillips, and others, lately depending in said court, as the same appears of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said middle district of Alabama, this fourth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk United States Circuit Court for the Middle District of Alabama.

47 EUGENE BEEBE, SIMS PHILLIPS, and ADALINE THOMAS,
Plaintiffs in Error,
vs.
THE UNITED STATES.

And now come the plaintiffs in error and assign as error:

1st. The rejection of the deed executed by the plaintiff in error Eugene Beebe to Ferrie Henshaw on the 22d day of March, 1877, offered in evidence by the plaintiffs in error, conveying to said Henshaw the property involved in this cause.

2. The rejection of said deed, offered in evidence by the plaintiffs in error, in connection with the facts the plaintiffs in error proposed to prove by the testimony of the said Eugene Beebe.

3d. The rejection of the testimony of said Eugene Beebe, offered by the plaintiffs in error in connection with said deed and to support the same.

4th. The charge of the court to the jury, "that if they believed the evidence, the plaintiff was entitled to recover the land sued for in this cause."

H. C. TOMPKINS,
MICHAEL L. WOODS,
Attorneys for Plaintiffs in Error.

Endorsed on cover: Case No. 14,936. M. Alabama C. C. U. S. No. 348. Eugene Beebe, Sims Phillips, and Adeline Thomas, plaintiffs in error, *vs.* The United States. Filed December 7, 1891.

The property of the defendant Beebe herein described, except the property known and described in the levy as the lot and storehouse known as the Bakery, on Perry street between Market and Monroe Str., was on the second day of July, 1877, sold to the United States for one thousand dollars and deed made to the United States for the same.

GEORGE TURNER,
U. S. Marshal.

Clerk's fees	$11 15
Marshal's fees	16 00
Attorney tax fee	20 00
	$47 15

In the Supreme Court of the United States, October Term, 1894.

EUGENE BEEBE *et al.*
v.
THE UNITED STATES. } No. 348.

Stipulation.

In this cause, it appearing that the return of the marshal upon Exhibit D, execution No. 75, which execution is set out on pages 24 to 27 of the printed record, has been erroneously omitted from the record, it is hereby agreed that the foregoing is a true and perfect copy of the said return, and that the same may be filed as a part of the transcript of the record in the cause in the Supreme Court of the United States and may be printed and attached to the record therein.

J. M. DICKINSON,
Assistant Attorney General.
H. C. TOMPKINS,
Counsel for Plaintiffs in Error.

Dated April 18, 1895.

[Endorsed:] Case No. 14,936. Supreme Court U. S., October term, 1894. Term No., 348. Eugene Beebe *et al.*, P. E., *vs.* The United States. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed May 2, 1895. James H. McKenney, clerk.

In Supreme Court of the United States.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

EUGENE BEEBE, SIM PHILLIPS AND ADELINE THOMAS,
Plaintiffs in Error,

versus

THE UNITED STATES,
Defendants in Error.

BRIEF AND ARGUMENT OF

H. C. TOMPKINS,

Attorney for Plaintiffs in Error.

STATEMENT OF CASE.

On the 27th day of February, 1886, The United States brought, in the Circuit Court of the United States for the Middle District of Alabama, two actions which are denominated by the Code of Alabama, "Actions in the Nature of Ejectment;" one of them numbered 59 on the docket of that court, but the first appearing in the transcript, was brought against Josiah Morris, Sim Phillips and Adeline Thomas, and was for the recovery of a tract of land known as the "Montgomery Race Track," containing eighty acres, and one

thousand dollars for the detention thereof; the other, numbered 57 on the docket of the court, was brought against Eugene Beebe alone, and was for the recovery of the same tract of land and also for the recovery of a lot and building and one thousand dollars damages for detention.

Printed Transcript, pp. 1–3.

Each of these suits was commenced by summons and complaint in the form prescribed by the Code of Alabama for such actions, and process was duly served upon the several defendants. On the 9th of December, 1889, the complaint in each case was amended; that in No. 57 by striking out the building and lot therein sued for, and by making the action for the recovery of an undivided one-fourth interest in the "Race Track," instead of for all of it, by giving a more particular description of the "Track," and by increasing the damages claimed from one to twenty-one thousand dollars; that in No. 59 was amended by making it an action for the recovery of an undivided one-fourth interest in the lands sued for, by more particularly describing them, and by increasing the amount of damages claimed as above stated.

Printed Transcript, pp. 3–5.

Beebe, on the suggestion that he was landlord of Phillips and Thomas, was made a party defendant in No. 57 on December 3d, 1889, and on the same day he and his co-defendants, Phillips and Thomas, filed their several pleas, setting up: 1st, that they were not guilty of the matters alleged in the complaint; 2d, that Plaintiffs' title and only title was under a deed executed by the United States Marshal for the District upon a purchase under an execution in favor of the United States and against him, and that at the time of the sale he had no such title as was subject to levy and sale under

execution; and 3d, that at the time suit was commenced The United States had no title to or interest in the property sued for. Morris filed a disclaimer of all interest in the property sued for in the amended complaint.

Printed Transcript, pp. 7–9.

A motion to strike pleas numbered 2d and 3d was filed on the 14th of May, 1890, but no action was ever taken by the court on the motion, nor does it appear ever to have been asked to act upon it.

On May 19th, 1890, on motion of the counsel for the United States, No. 57 was consolidated with No. 59, and on the 20th the complaint was so amended as to strike out all claim for damages for the detention of the property. At that May Term of the court the case was tried and resulted in a judgment for defendants, but subsequently a new trial was granted and the judgment set aside. The case came on again for trial on December 9th, 1890, and on that trial the claim of Josiah Morris was confessed and he discharged and a judgment rendered against the other defendants for an undivided one-fourth interest in the lands described in the complaint and the costs of suit.

Printed Transcript, pp. 15–16.

The questions reserved and presented to the court for decision all arose on the trial before the jury and are shown by a bill of exceptions taken at the time.

To sustain their right of recovery the United States introduced: 1st, a deed made by Morris and wife to Beebe and one Henshaw, in June, 1873, to an undivided one-half interest in the lands described in the complaint, accompanied by defendants' admission that at the time of its execution Morris was seized and possessed of the lands therein described; 2d, the minute entries of two judgments against Beebe and others

rendered by the Circuit Court of the United States; 3d, the executions issued on those judgments on May 10th, 1877, with the endorsements thereon; and 4th, a deed made by George Turner, Marshal, to the United States on the 2d day of July, 1877. This was all the evidence introduced by the Plaintiffs.

Printed Transcript, p. 18.

Copies of the several entries, executions, etc., introduced are attached as exhibits to and made parts of the bill of exceptions. One of the judgments was for $1,686.68, and the other for $991.00; each of the judgment entries has upon it these words: "Ex. stayed till 25th of March, 1877;" that for $991.00 contains, after authorizing the issuance of an execution, this clause: "And by consent execution is stayed until the 25th day of March, A. D. 1877," while that for $1,686.68 contains this clause: "And by consent this execution is stayed until the 25th day of March, A. D. 1877."

Printed Transcript, p. 21.

The two executions introduced in evidence each bear date May 18th, 1877. The one issued on the judgment for $991.00 shows, by the endorsement thereon, that it was nearly satisfied both as to principal and costs by the sale of certain stock levied on as the property of a defendant named Candee, which was sold for $1,000.-00, and, while it was levied on the property in execution, it does not appear from any endorsement thereon that there was ever any sale under it.

Printed Transcript, pp. 22–4.

The execution on the judgment for $1,686.68 was levied on the property in controversy and other property of Beebe on the 10th of May, 1877, the day of its issuance, and it appears from the endorsement thereon that the property was sold on the 2d day of July, 1877,

and at such sale was bid in by "The United States" for one thousand dollars.

Printed Transcript, pp. 24–5.

As hereinabove stated, there is no endorsement on the execution on the judgment for $991.00 showing that there was ever any sale of the property in controversy under that particular execution, but the deed to the Plaintiffs recites that it was sold under that execution and does not refer to any other. The deed is in the ordinary form of a sheriff's deed, recites the levy of the execution, the advertisement of the sale, and that the United States were the highest and best bidders thereat, and bought it in for the sum of one thousand dollars, and conveys to them all the legal right, title, interest and claim which Beebe had or held in and to the property levied upon, which included not only the property in controversy, but also three lots and the buildings thereon and a half interest in another lot and building, all in the city of Montgomery, Alabama. The property appears to have been put up and sold in bulk. It does not appear who bid it in for the United States; nor is it shown that any person was authorized to buy it in for the United States.

Printed Transcript, p. 27.

This was all of the evidence introduced by the Government.

The defendants offered to introduce a deed made by Beebe to Ferrie Henshaw, on the 22d day of March, 1877. That deed recited that a partnership had existed for many years between the parties, that the firm was indebted to various persons, that on a settlement Beebe would be largely indebted to the firm and to Henshaw, the precise amount of which indebtedness could not be ascertained until all the debts were paid and a settlement of all partnership matters had between

them. It further recites that they owned as partners a number of parcels of real estate, including a half interest in the "Montgomery Race Track," and some few articles of personal property, all of which are fully described, then follows the following:

"Now, therefore, in consideration of the premises and to protect and secure the creditors of said firm, and to enable the said Henshaw the more easily and readily to pay the debts of said firm, and to protect and secure the said Ferrie Henshaw for the moneys he has advanced and paid out for said firm of E. Beebe & Co. in excess of his proportion thereof, and to protect and secure him for all the moneys I may owe said firm or said Henshaw on a settlement between us of the affairs and business of said firm, I, the said Eugene Beebe, have granted, bargained and sold, and conveyed, and do hereby grant, bargain, sell and convey all my interest and estate in the above-described real and personal property, as said partner or otherwise, to the said Ferrie Henshaw, in trust, to sell the same at such times and places and on such terms, on credit or for cash, or for part cash and part credit, and at private or public sale, as the best interests of the said creditors of said firm and of him and myself as he may determine, and to apply the proceeds thereof to the payment of the debts of said firm and to the payment of what I may be found indebted to said firm or to said Ferrie Henshaw on the settlement between us of the affairs and business of said firm, and if any excess should remain in his hands from the sale of said property after the payment of said debts of said firm and of what I may owe the firm or owe him on the said settlement of the business and affairs of said firm, then he shall pay back to me such excess; and if there should remain in his hands any of said property not required to be sold for the purposes aforesaid, then on such final settle-

ment between us he shall reconvey the same to me, my heirs or assigns."

This deed was duly recorded in the office of the judge of probate in the county in which the property was situate on the 23d day of March, 1877.

Printed Transcript, p. 30.

At the time the deed was offered Beebe was on the stand as a witness; defendants stated that in connection with the deed they intended to prove by him the following facts:

1st. That at the time of the execution of the deed Beebe and Henshaw were, and for many years prior thereto had been partners, doing business in the firm name of E. Beebe & Co.

2d. That the firm owed debts amounting to $40,000, that in addition to that Beebe was indebted to Henshaw on partnership account about $2,000, and on other accounts about $2,000.

3d. That the property here involved was purchased while they were partners and with partnership assets.

4th. That the deed had been delivered to and accepted by Henshaw.

It was admitted by the defendants that Henshaw had never sold any of the property conveyed by the deed and nothing had been done thereunder. Before defendants stated that they intended to prove the facts set out above, Plaintiffs objected to the deed upon the following grounds:

1st. That it is a mortgage.

2d. That it is void upon its face.

3d. That it is void upon its face as against the United States.

4th. That it sets up no claim superior to that of the United States.

5th. That it sets up no claim superior to the title of the United States acquired at the execution sale.

6th. That there is no offer to show a foreclosure under it.

The court sustained the objection and defendants duly excepted. Defendants offered no other evidence.

Plaintiffs then introduced in evidence a deed made by Henshaw reconveying the property to Beebe on the 23rd of February, 1878, and, in connection with this, it was shown that after the deed was made to Henshaw in March, 1877, his habits became very bad, that he was often under the influence of liquor and incapable of attending to business; that thereupon Beebe procured him to execute the reconveyance, and that at the time of its execution the debts and affairs of the partnership had not been settled and paid.

It was admitted by all of the parties in open court that the interest in the property sued for by the United States at the time the suit was brought was worth over five thousand dollars and at the time of the trial was worth over fifty thousand dollars.

This was all of the evidence introduced or offered to be introduced, and, thereupon, the court instructed the jury that if they believed the evidence the Plaintiffs were entitled to recover the land sued for.

To the giving of this instruction defendants duly excepted.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign the following grounds of error:

1st. The rejection of the deed executed by the plaintiff in error, Eugene Beebe, to Ferrie Henshaw on the 22nd day of March, 1877, offered in evidence by the plaintiffs in error, conveying to said Henshaw the property involved in this cause.

2nd. The rejection of said deed, offered in evidence by the plaintiffs in error, in connection with the facts

the plaintiffs in error proposed to prove by the testimony of the said Eugene Beebe.

3rd. The rejection of the testimony of the said Eugene Beebe, offered by the plaintiffs in error in connection with said deed and to support the same.

4th. The charge of the court to the jury, "that if they believed the evidence, the plaintiff was entitled to recover the land sued for in this cause."

ARGUMENT.

The law authorizing actions of the character here brought for the recovery of real estate was enacted many years ago and is found in Section 2696 of the Code of Alabama adopted in 1886, and is as follows:

"2696 (2959, 2960). Action in the nature of ejectment. An action for the recovery of lands, or possession thereof, in the nature of an action of ejectment, may be maintained without a statement of any lease or demise to the plaintiff, or ouster by a casual or nominal ejector; and the complaint is sufficient if it alleges that the plaintiff was possessed of the premises, or has the legal title thereto, properly designating or describing them, and that the defendant entered thereupon, and unlawfully withholds and detains the same."

Section 2698 of the same Code declares the effect of pleading the general issue—not guilty—and is as follows:

"2698 (2962.) Effect of pleading general issue. The general issue in an action in the nature of an action of ejectment is "not guilty," and under it the defendant may give in evidence the same matters which may be given in evidence under such plea in an action of ejectment; the general issue is an admission that the defendant is in possession of the premises sued for."

The pleas filed in the case are three in number, the first being the plea of not guilty or the general issue

and in the form prescribed by the Alabama Code for such a plea and a copy of that form.

Code of 1886, p. 796, Form 34.

The second denies that the United States had such a title as would support the action, averring that their only title was through a deed made by the United States Marshal upon a pretended sale of the property under an execution against defendant Beebe, and then avers that Beebe had no such title as was subject to levy and sale under execution. The third plea denies that the United States had any title or interest in the property. These two last pleas were what might be called limited pleas of not guilty; they each put in issue a fact which the plaintiffs were bound to establish before there could be any recovery, namely, that they had such a title as would entitle them to recover in a court of law. The effect of the plea of not guilty in actions such as this is well established by the decisions of the Supreme Court of Alabama. In a recent case, Bynum v. Gold, not yet reported in the official reports, but to be found in 17 So. Rep. on p. 667, the court, following the well established rule, declare that "The title is put in issue by the plea, and under it the defendant may show any fact going to title, whether in denial and disproof merely of the title relied on by the plaintiff, or in support of a superior title, an independent right, however acquired in the defendant."

In another case decided by the same court, and reported in the same book on page 670, Lomb v. Pioneer S. &. L. Co., speaking through the Chief Justice, the court says of the effect of the plea, "It casts upon the plaintiff the burden of proving a legal right to the possession of the premises in dispute, and, of consequence, whatever operates a bar to his right of possession causes him to fail, entitling the defendant to a verdict."

It is perfectly clear in view of these decisions, that simply declare a rule which is recognized by all the courts, that the Plaintiffs below before they were entitled to recover, as they relied entirely upon title, and not a prior possession, were bound to establish a legal title to the property sued for; if they had made out a *prima facie* case, which for the sake of the argument we can concede they did in this case, by proof of a conveyance to Beebe of an undivided interest in 1873, and by proof of the judgment against him, the execution thereon and sale and conveyance thereunder, then the burden was simply shifted to defendants to show that they did not have such legal title to rebut the *prima facie* case; and any fact going to disprove such legal title, going to show that Plaintiffs had no title at all, or if they had any, it was at most but an equitable title, was competent evidence, and if it was offered and excluded, its exclusion was error.

As Plaintiffs claim under a title acquired by a sale under execution, it was competent for the defendants in this case to prove that Beebe had no such title as was subject to execution, although he was the defendant in execution. Where a plaintiff claims under a sale under execution, the burden is upon him to prove that defendant had an estate or interest in the lands which was subject to such execution, and, necessarily, if he makes out a *prima facie* case, defendant may rebut it by showing he had no such title. There is no estoppel against defendant.

Doe Ex Dem. Davis v. McKinney, 5 Ala. 719.
Elmore v. Harris, 13 Ala. 360.
Doe Ex Dem. Cook v. Webb, 18 Ala. 810.
You v. Flinn, 34 Ala. 409.
Smith v. McCann, 24 How. 398.
Badham v. Cox, 11 Iredell L. 456.
Dickinson v. Smith, 25 Barb. 102.

Westheimer v. Reed, 15 Neb. 662.
McArthur v. Oliver, 60 Mich. 606.

In the case cited from the 18 Ala. the court say: "It is indispensable to a recovery by the plaintiff in ejectment that he show such title in himself as will support the action. He must, at least, make out a *prima facie* case, from which the law would draw the inference of title, as that he, or those from whom he claims, had the prior possession of the land, before he can put the defendant upon proof of his title. If the plaintiff claim the land under a purchase at sheriff's sale, he must prove four things, namely, a judgment, execution thereon, furnishing authority to the sheriff to levy and sell, the sheriff's deed for the land, and that the defendant had such interests, under the statutes of this State, was transmissible by such deed.

"It may be sufficient to show that the defendant in the judgment was, at the time of its rendition, or between that period and the time of the levy, in the possession of the land; for in such case the presumption of ownership arises, as the law will not presume he was a trespasser; but no case has been found which holds that the defendant may not explain the character of his possession so as to refer it to a title which can not be sold. On the contrary we have repeatedly held, that if he is in possession, holding under a bond for title, which gives but an equitable estate, he may protect himself by proving this fact, and thus defeat the purchaser's action." "Were the law as contended for by the counsel for the plaintiff in error, that the defendant in the judgment, when sued by the purchaser at sheriff's sale to recover the possession, is estopped from showing that she had no such interest as was liable to be sold, persons holding land in a fiduciary character, such as executors, administrators, guardians, &c., could be turned out of possession and the execu-

tion of their respective trusts impeded, or else turned round to the court of chancery for an injunction. But we are persuaded that such is not the law, and it may safely be asserted as an indisputable rule, that the defendant, in such cases, may defeat a recovery by the purchaser, by showing the entire absence of such interest in the defendant in the judgment, as could be sold under execution. Such proof goes to the foundation of the plaintiff's title, and shows his sheriff's deed to be utterly worthless as a title-paper."

When the United States go into court as plaintiffs they have no other or greater right than any citizen who is a plaintiff.

Mitchell v. U. S., 9 Peters 711.
The Syren, 7 Wall. 159.
United States v. Beebe, 17 Fed. R. 36.

The last case cited contains a full collection of the cases on this point.

The rights of judgment creditors in the Federal courts are the same as those of judgment creditors in the State courts, and in determining whether a judgment is a lien upon property, or what interest in property can be sold under execution, we are to look to the statutes of the State in which the Federal court rendering the judgment sits.

Revised Statutes, Sections 914, 967.
U. S. v. Morrison, 4 Peters 123.
Williams v. Benedict, 8 How. 107.
Ward v. Chamberlain, 2 Black 430.

It is true that where a judgment is a lien on the property of the debtor and subsequently an execution issues thereon and is levied on such property, the lien relates back to the date of the rendition of the judgment; and if the defendant at that time had such an interest in the property as was subject to levy and

sale, a purchaser at such sale acquires that interest and can recover it of any intervening purchaser from the debtor. But it is well settled law in Alabama that from the adoption of the Code of 1852 to the enactment of the act of February 28, 1887, making a recorded judgment a lien, judgments were not liens on the defendant's property either real or personal.

Daily v. Burks, 28 Ala. 328.
Curry v. Landers, 35 Ala. 280.
Dane v. McArthur, 57 Ala. 448.
Walker v. Elledge, 65 Ala. 52.
Enslen v. Wheeler, 98 Ala. 200.

Under the very terms of the judgment recovered by the United States no execution could have issued on it until March 25, 1877, three days after the execution and two days after the record of the deed made by Beebe to Henshaw; and the only executions shown by the record to have been issued on the judments were issued on the 10th of May, 1877. The record affirmatively shows that these were the only executions introduced in evidence, and the Marshal's deed shows that it was under one of these executions that the property was sold. If the deed from Beebe to Henshaw operated to convey out of the former all title and interest which was subject to execution, then it follows necessarily that by the purchase at execution sale the United States acquired no title or interest in the land, and certainly no such legal title as would support ejectment.

In determining what title or interest in lands is subject to execution in Alabama, as we have seen, we must look to the statutes of Alabama. The present law of Alabama prescribing what property of a defendant in execution may be levied upon was first found in the Code of 1852, and is as follows:

"Sec. 2455. Executions may be levied:

1. On real property to which the defendant has a legal title or a perfect equity, having paid the purchase money, or in which he has a vested legal interest, in possession, reversion or remainder, whether he has the entire estate or is entitled to it in common with others.

2. On personal property of the defendant (except things in action) whether he has the absolute title thereto, or the right only to the possession thereof for his own life, the life of another, or any shorter period. But this does not apply to a possession acquired by a bona fide hiring of a slave or other chattels.

3. On an equity of redemption in either land or personal property. When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant and subject to all his disabilities."

The statute has remained the same to the present time, except the words "a slave or other," in the second subdivision, have been omitted.

Revised Code (1867), Sec. 2871.

Code of 1876, Sec. 3209.

Code of 1886, Sec. 2892.

From a reading of these sections it plainly appears that lands could and can be levied on in the following cases only:

1st. Where the defendant has a legal title to the same.

2nd. Where he has a vested *legal* interest in possession, reversion or remainder.

3rd. Where he has a perfect equity, having paid the purchase money, and

4th. Where he has an equity of redemption therein. In this last case the statute expressly provides that the purchaser shall be subrogated to all the rights and subject to all the disabilities of the defendant.

We will discuss these various heads seriatim:

First. The deed offered in evidence by the defendants and excluded on the objection of Plaintiffs, after describing various lots or parcels of land, including that involved in this suit, and after reciting the consideration, grants, bargains, sells and conveys to Henshaw all of Beebe's interest and estate in the property described. The use of these words very clearly operated to divest out of Beebe his entire legal title and interest in the lands.

4 Kent's Com., Star p. 461.
Jones v. Reese, 65 Ala. 184.
Chapman v. Abraham, 61 Ala. 108.
Chambers v. Ringstaff, 69 Ala. 140.

Then, unless the deed was void, a question we will hereafter discuss, there was left in Beebe, after its execution, no legal title or vested legal interest in possession, reversion or remainder. This disposes of the first and second classes of interest in realty which are subject to execution under the laws of Alabama.

Second. The next or third interest in lands which may be levied on under execution under the laws of Alabama is where the defendant has a perfect equity, having paid the purchase money. Here the statute clearly defines the interest liable; it is the perfect equity that the vendee of land who has paid all the purchase money has in and to the same. It is where the defendant in execution holds lands under a contract of purchase, and having paid all the purchase money, nothing remains to be done in order to vest in him a perfect legal and equitable title except the execution of a deed by the vendor conveying to him the legal title. This, we say, is manifest from the mere reading of the statute, and the Supreme Court of the State has repeatedly so held.

Shaw v. Lindsey, 60 Ala. 344.
Smith v. Cockerel, 66 Ala. 64.
Goodbar v. Daniel, 88 Ala. 583, 588.
Beebe certainly had no perfect equity in the land.

Third. This brings us to the consideration of the only remaining interest which may be levied on under the laws of Alabama,—an equity of redemption.

Did the deed offered in evidence leave in Beebe what is known as an equity of redemption in the lands? It was, on what appears to us an entirely erroneous construction of the deed, so held by the court below, and the deed was excluded upon the theory that, as under the decisions of the Supreme Court of Alabama a purchaser of the equity of redemption could maintain ejectment against the defendant in execution, the deed was irrelevant. This construction of the deed, we respectfully insist, was manifestly wrong. Bouvier, in his Law Dictionary, defines an equity of redemption to be, "A right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest and costs." The term has never been applied to any other estate or interest except the right of the mortgagor, after default in payment of the debt secured by the mortgage or deed of trust, to pay that debt, interest and costs and have the mortgaged property reconveyed to him. To create such a right, two things are certainly essential,—a debt and a conveyance of the legal title to secure that debt. At common law, the title of the mortgagee became absolute if the debt was not paid at maturity. Courts of Equity, to relieve the debtor from the harshness of that common law rule established the right of the mortgagor to relieve himself from the

forfeiture of his land by paying the debt even after the estate of the mortgagee had become absolute at law. It is this equitable right which is technically known as "The Equity of Redemption."

There can be no such right in a case where property is conveyed to one in trust to be sold and the proceeds applied to the payment of debts, because in such a case there is no such forfeiture imposed by the common law, nothing against which a court of equity is called upon to relieve.

1 Pomeroy's Equity, Sec's 162, 320, 1179–81.

2 Story's Equity, Sec's 1012–15.

As said above, there can be no such thing as an equity of redemption unless there is a conveyance to secure a debt. There must be a secured debt matured and unpaid and a consequent forfeiture of the debtor's entire estate in the lands by his failure to pay the secured debt at maturity before this equity of redemption can have any existence. It has no existence when the deed conveys property not to secure a debt with power of sale in default of payment, but conveys it with express directions to sell the property and apply the proceeds to the payment of debts. A deed of the latter class is a deed of assignment and leaves in the grantor no equity of redemption. But we insist that this question is not an open one, but has been expressly decided by the Supreme Court of Alabama, and by other courts. Section 1879 of the Code of Alabama of 1886 gives to a debtor whose real estate has been sold under execution, a decree of a court of chancery, or under a deed of trust or power of sale in a mortgage the right to redeem the same within two years after such sale; and section 1883 of that Code gives to a certain class of the judgment creditors of the debtor the same right. This has been the law of Alabama since 1842, as shown by the

decision of this court in Howard vs. Bugbee, 24 Howard, 461. In Comer et al. vs. Constantine, 86 Ala. 492, C. and A. had conveyed their property to one T. in trust to be sold by him, and the proceeds applied to the payment of their debts. Under this deed, the trustee sold a part of the realty, and appellants being judgment creditors of C. and A, who were under the law entitled to redeem if the instrument conveying the title to T. was either a mortgage or a deed of trust in the nature of a mortgage, filed a bill to redeem from the purchaser Constantine. The chancellor dismissed the bill on a demurrer for want of equity, and from the decree so dismissing it an appeal was taken to the Supreme Court. In the opinion of that court affirming the ruling of the chancellor the distinction between conveyances to secure debts and conveyances directing property to be sold and the proceeds applied to the payment of debts, like the one offered in evidence in the court below, is very clearly and forcibly drawn, and it is expressly held where the conveyance is of the latter class, that there is no equity or redemption left in the grantor. The court, through Justice McClellan, says:

"The distinction between a mortgage, or a deed of trust in the nature of a mortgage, to secure the payment of a particular debt or debts, and a deed of trust of all the grantor's property for the payment of all his debts, commonly and properly known as a general assignment for the benefit of creditors, is well defined and radical. The purpose of the class of instruments first named is to *secure* a particular indebtedness; the purpose of the latter is to pay all the indebtedness of the grantor. In the former, a defeasible title only passes, and the property reverts to the grantor upon the happening of certain stipulated conditions; in the latter, the entire, indefeasible title goes out of the grantor, and the property is vested absolutely in the

assignee. In the one class, equitably considered, a lien is created on the property, in favor of the creditors intended to be secured, and the property itself is still regarded as the grantor's; in the other, there is an absolute appropriation of the property to the creditors, and both the legal and equitable title is passed beyond the control of the assignor. With respect to realty conveyed by mortgage, or deed of trust in the nature of a mortgage, an equity of redemption remains in the grantor until foreclosure by sale; as to land conveyed in trust for the benefit of all creditors, and to pay general indebtedness, there remains no equity of redemption, and the trust which results to the grantor, either expressly, or by implication of law, in such of the property, or its proceeds, as is not absorbed in the payment of his indebtedness, is not such equity, nor any evidence of it."

The distinction here drawn is recognized by the courts everywhere. In Bartlett v. Teal, 1 Federal Reporter, 768, the question was whether a certain instrument was a mortgage, or deed of trust in the nature of a mortgage, or an assignment for the benefit of creditors. The Circuit Court, in an opinion by Judge Caldwell, concurred in by McCrary, C. J., says:

"A brief consideration of the purposes and effect of the several instruments mentioned will disclose to which class this instrument belongs. A mortgage does not invest the mortgagee with an absolute and indefeasible title; the equitable title, called the equity of redemption, remains in the mortgagor. The mortgage is a security for debt, and creates a *lien* upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust, executed to secure a debt, where the power of sale is placed in a third person. Both are *securities* for a debt; both create *specific liens* on

the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust."—Burrill on Assignments, Sec. 6; *Turner v. Watkins*, 31 Ark. 429, 437; Dillon's Monograph on Trust Deeds, 11 Am. Law Register (N. S. 1863), 648.

"An assignment for the benefit of creditors is well defined to be 'a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor.'"—Burrill on Assignments, Sec. 2. "The terms of the instrument in this case, bring it exactly within this definition, and stamp it as an assignment for the benefit of creditors, and not as a mortgage, or deed of trust in the nature of a mortgage. Unlike a mortgage or deed of trust, it was given by way of *security*. There is no defeasance clause giving the grantor the right of redemption; it does not create a lien on the property, but conveys it absolutely for the purpose of raising a fund to pay debts; and, if valid, passed the absolute title, legal and equitable, to the grantors in the deed, subject to the trust, and placed the same beyond the reach of the debtor, as well as her creditors, until the purposes of the trust were satisfied. When the debts were paid the debtor had a right to the surplus, but until that was done she had no legal or equitable interest in the property, or its proceeds, that could be sold or encumbered or seized on attachment or execution by her creditors."

It will be noticed that one of the chief grounds of the distinction between the two classes of instruments, referred to in each of the opinions, is that, whereas, in

instruments to secure debts there remains in the grantor an equity of redemption which may be seized and sold under judicial process by his creditors, where the instrument conveys property to a trustee to apply the same, or the proceeds thereof, to the payment of some or all of his debts and to return the surplus, if any, to the debtor, it passes all of the grantor's title, legal and equitable, and leaves in him no equity of redemption whatever. Numerous authorities sustain this distinction, which is clear upon reason.

Martin v. Hausman, 14 Fed. Rep. 160.
Briggs v. Davis, 21 N. Y. 574.
Hoffman v. Mackall, 5 Ohio St. 124.
Mills v. Williams, 31 Mo. App. 447.
Burrill on Assignments, 6th Ed., Sec. 8.

The Supreme Court of Alabama held at one time that the purchaser of the equity of redemption could not maintain ejectment, but acquired only an equitable title and must enforce his rights in a court of equity; which clearly seems to be the necessary construction of the language of the statute making such an interest subject to levy.

Childress v. Monette, 54 Ala. 317.
Atcheson v. Broadhead, 56 Ala. 414.

In Cotton v. Carlisle, 85 Ala. 175, it was decided that the purchaser of such equity could maintain ejectment against the defendant in execution. This decision is an authority in support of our contention, because the ruling is based upon the ground that, as between the mortgagor and third persons, the mortgage is but a security for a debt and the mortgagor the owner of the fee. This is expressly declared in Denby v. Mellgrew, 58 Ala. 147, and Allen v. Kellam, 69 Ala. 442, the two cases relied upon as sustaining the conclusion reached

in Cotton v. Carlisle. It can hardly be contended that such is the proper construction of a deed of trust with direction for the trustee to sell property and apply the proceeds in payment of the grantor's debts. That passes the title both legal and equitable. The equitable right to have the surplus, after the payment of snch debts, paid to such grantor or the property not needed in the payment of such debts reconveyed to him is not a legal title as between him and even third persons.

This disposes, we submit, of the contention that the instrument offered in evidence left in Beebe an equity of redemption which was subject to levy and sale.

The grounds of objection to the introduction of the deed were six in number, but may be classed under four several heads: 1st, that it was a mortgage; 2d, that it was void upon its face; 3d, that it set up no claim superior to the claim of the United States; and 4th, that there was no offer to show a foreclosure under it.

The first ground of objection, we have fully discussed above.

We have never heard upon what ground it is claimed that the deed is void upon its face as against the United States or any one else, and, therefore, hardly know how to argue that ground. We admit that, under the well settled law of Alabama, a deed by a debtor reciting a valuable consideration is no evidence against an existing creditor of the consideration, and that, when it is attacked by such a creditor, a consideration must be proved. Such a deed, however, is not void upon its face. If the recitals of the conveyance were true, Beebe was doing that which the law would have compelled him to do, namely, appropiating his interest in the partnership property to the payment of the partnership debts. The law certainly would not declare

his act a nullity, but, on the contrary, would commend him for doing it. The mere fact that there was evidence of an outside fact, namely, that, at the time he made it, he was indebted to the United States, which fact would have required him to introduce extraneous proof of the existence of the debts the deed was made to pay, did not make the deed void on its face against that creditor or justify its exclusion from the jury. On the face of the deed there is not a thing against public policy, good morals, or the statutes. There was no policy or statute of the State of Alabama or of the United States which was violated by Beebe's appropiating his property to the payment of his debts, and it certainly was not against good morals to do so. If there was any objection to the deed, it must have been on the ground that it was a violation of the statute of Elizabeth, which has been enacted in Alabama, making conveyances made with the intent to hinder, delay or defraud creditors fraudulent and void; but that does not make the deed void on its face. It is not void, but is merely voidable at the instance of existing creditors, and in some cases, at the instance of subsequent creditors, upon proof that they are such creditors and upon proof of such fraudulent intent.

P. & M. Bank v. Borland, 5 Ala. 531.
Frow v. Smith, 10 Ala. 571.
Fletcher v. Stone, 3 Pick. 250, 252–4.

We know of no statute which makes a deed void against the United States as creditors of a citizen where it would not be void as against other creditors. In this connection it should be noticed that there was no proof whatever that the property conveyed by Beebe was all, or substantially all, of the property owned by him at the time. For all that appeared in the evidence, he may have owned individually more than sufficient property to have paid all his debts.

But the deed, taken in connection with the other facts which defendants proposed to prove, shows that it was a *bona fide* conveyance. Those facts were that the property conveyed was partnership assets and that the partnership was at the time largely indebted to various persons, and that Beebe was himself indebted to his partner on account of partnership matters. In other words, in connection with the deed defendants proposed to prove that every recital in it was true. If such recitals were true, then what was the effect of the deed? It was to do what a court of equity would have compelled him, Beebe, to do, namely, to appropriate his interest in the partnership assets to the payment of the partnership debts and to the payment of what he might have owed his copartner on the settlement of the partnership. If the facts offered to be proved were true, the property was subject to the payment of those partnership debts and to what might be due the copartner on a settlement of the partnership before any of it could have been appropriated to the payment of the individual debts of Beebe. And this is the case, although the United States be the creditors of the individual member. Then the act so appropriating it could not have been void.

United States v. Hack, 8 Peters 271.
Claggett v. Kilbourne, 1 Black 346.
Shanks v. Klein, 104 U. S. 18.
Emanuel v. Bird, 19 Ala. 596.
Abraham v. Janney, 102 Ala. 431.
Donelson v. Posey, 13 Ala. 752.
Andrews v. Brown, 21 Ala. 437.

The deed then was not only not void on its face, but if the facts proposed to be proved were found true, it was a bona fide conveyance on the facts.

Another ground of objection to the deed was that

the title passed by the deed was not superior to that of the United States. It was certainly superior to that of the United States unless they had, at the time of its execution, a lien upon the property and the sale was merely in enforcement of that lien. The sale was for collection of the judgment, and we have seen that the judgment was no lien. Until the lien, in execution of which the sale was made, attached, Beebe had full dominion over his property, and could alienate it, unincumbered by any lien, to a purchaser.

Adler v. Fenton, 24 How. 407.
Morsell v. The Bank, 91 U. S. 357.
Gamble v. Fowler, 58 Ala. 576.
Lovelace v. Webb, 62 Ala. 271, 282.

And this court has held that if the conveyance was made before such lien attached, in a court of law it was good, even though it was made with fraudulent intent.

Miller v. Sherry, 23 Wall. 237.

But it was insisted below that the title acquired by the United States was superior because of the provisions of section 3466 of the Revised Statutes. That section is as follows:

"SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts,

makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Even a casual reading of the section will show that, under the facts disclosed by the record, it has no application. The statute by its express terms does not come into operation until the debtor becomes insolvent, and there is no proof whatever that Beebe was insolvent at that time. The fact that a debtor makes an assignment, even where he assigns his individual property, does not bring the statute into operation; it is only where the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment of the same. To bring a case like this within the operation of this statute, it is necessary that the debtor should not have sufficient property to pay all of his debts and that he should make a voluntary assignment of all, or substantially all of that property. There is no proof of either of these facts in the record in this case. And to bring the case within the operation of the statute it was incumbent on the United States to prove each of them. The construction of the statute here contended for is the clear import of the language and is the construction placed upon it by this court.

The United States v. Hooe, 3 Cranch 73.
Prince v. Bartlett, 8 Cranch 431.
Thelusson v. Smith, 2 Wheat. 396.
The United States v. Howland, 4 Wheat. 108.
Lewis v. The United States, 92 U. S. 618.
Conard v. Atlantic Ins. Co., 1 Peters 386, 438.
Beaston v. The Bank, 12 Peters 102.

If the rule is as above stated, that even where the debtor conveys his individual property, before the lien of the United States can attach it is incumbent on

them to show the insolvency of the debtor and an assignment of substantially all the property held by him, *a fortiori*, where the assignment is of partnership property to pay partnership debts, the lien can not attach, because we have seen the statute gives the United States no priority over partnership creditors; on the contrary, the courts recognize that their claims are prior to that of the government.

United States vs. Hack, 8 Peters 271.

But suppose, for the sake of argument, that the government did under the statute under consideration obtain a right to priority of payment out of the property assigned, that would give it no right to enforce the payment by sale under execution. The right thus given is not a lien upon the property. It does not annul the assignment; on the contrary, it recognizes the validity of the assignment and gives the government, in the administration of the trust created by the deed, the right to have its claim paid in preference to all others. It makes the government one of the beneficiaries of the trust, and a beneficiary entitled to priority. As this right is merely an equitable one against the property, although it may give a right of action at law against the trustee under certain circumstances, the forum and only forum in which that right could be enforced is a court of equity.

The United States vs. Hooe, 3 Cranch 73.
Prince vs. Bartlett, 8 Cranch 431.
Thelusson vs. Smith, 2 Wheat. 396.
The United States vs. Howland, 4 Wheat. 108.
Lewis vs. The United States, 92 U. S. 618.
Conard vs. Atlantic Ins. Co., 1 Peters 386, 438.
Beaston vs. The Bank, 12 Peters 102.

This equitable right, if this is a case within the statute, attached immediately upon the execution of the deed, and could not be divested by any act of the trustee, except a sale of the property under the power contained in the deed and for the purposes for which it was made, and then the right would attach to the proceeds. The right to subject the property, in case the trustee failed to do so, to the payment of the claims of the several beneficiaries, including the United States, exists to-day as fully as it existed on the 25th of March, 1877, and can be enforced in a court of equity to-day as well as it could have been enforced in March, 1877.

Anniston Carriage Works vs. Ward, 102 Ala. 670.

The United States by enforcing this right could get all they ought in conscience to ask. They can collect every dollar of the balance due them on their judgments with interest, and that is all they should ask. The bill of exceptions in this case shows that the undivided interest for which they have brought suit in this case alone is worth over fifty thousand dollars; in addition, a number of other pieces of property were bought in at the sale. If the government gets its money and interest, it should be satisfied, and it ought not to wish to take from one of its citizens property of a value at least twenty times greater than the amount of their claim against him.

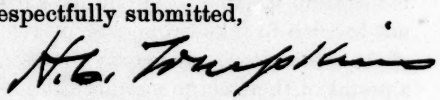
After plaintiffs had closed their case and the court had excluded all the evidence offered by the defendants, Plaintiffs introduced a deed made by Henshaw many months after the sale of the property under the execution, by which he undertook to reconvey the property to Beebe. Of course, this could not have made good the title of the Plaintiffs. They had to recover on the title which Beebe had at the time the levy was made. There is no element of estoppel against the defendant

in execution by the deed of the Marshal, and it conveyed only such title as he then had and not a title he thereafter acquired. In actions for the recovery of real estate based upon such a deed, the sole question is, did the defendant at the time of the sale, or at the time the lien, in the enforcement of which the sale was made, attached, have such an interest in the property as could be sold under execution, and such a legal title as will support ejectment? If he did not have, then no subsequently acquired title of the defendant will inure to the benefit of such purchaser.

Cook v. Webb, 18 Ala. 810.
Badham v. Cox, 11 Iredell L. 456.
McArthur v. Oliver, 60 Mich. 606.
Westheimer v. Reed, 15 Neb. 662.
Bates v. Bacon, 66 Texas 348.
Pratt v. Phillips, 1 Sneed 543.

We have not discussed the objection to the admission of the deed on the ground that it was not proposed to show that it had been foreclosed. As the question was as to the title Beebe had at the time of the sale, it is manifest that whether the trustee had or had not executed the trust was entirely irrelevant.

Respectfully submitted,



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